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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 221 23

TAZE HAMRICK GIBSON,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S BRIEF

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INDEX

Subject Index

	Page
Title and number of cause	*front cover*
This Index	i
Jurisdiction	1
Opinion below	2
Statute and regulations involved	2
Constitutional provisions involved	2
Questions presented	2
Statement of case	5
Form and history of action	5
Facts	6
How issues raised	11
Specification of errors	13
Points for argument	14
Argument	16
ONE—A sensible construction of the Act and reasonable application of the Constitution require that petitioner be allowed to challenge the validity of the administrative action supporting the judgment of conviction in defense to the indictment	16
[A] The Act should be construed so as to allow a registrant who has been declared acceptable by the Civilian Public Service Camp and who is charged with violation of Section 11, to make a defense to the indictment, that the administrative action is illegal, and not to require him to remain at camp and apply for a writ of habeas corpus to review the illegality of the determination or action of the draft boards	16
[B] A reasonable interpretation of the Constitution compels a construction of the Act allowing petitioner his defenses to the indictment so as to avoid the Act's abridging the Constitution	16

Page

I. If the Act is construed so as to deny a challenge of the validity of the administrative action in defense to the indictment based thereon, petitioner will be denied his right to due process, judicial trial, and right of trial by jury, contrary to Article III and the Fifth and Sixth Amendments to the Constitution 16

II. If the Act is construed so as to deny a challenge of the validity of the administrative action in defense to the indictment based thereon, the Act will be transformed into a bill of pains and penalties contrary to Article I, Section 9, Clause 3 of the Constitution 16

TWO—A sensible construction of the Act requires that orders of draft boards should be invalidated when it appears that they are made in excess of jurisdiction, without support of any evidence, contrary to the undisputed evidence, arbitrarily and capriciously, or when there has been a violation of the rights of procedural due process as to persons exempt from duty under the Act 33

THREE—It was reversible error for the trial court to refuse petitioner the right to challenge the legality of the action of the administrative agency by its denying petitioner his claim for exemption from training and service, which action was in violation of the Act, the Regulations and the due process clause of the Fifth Amendment to the Constitution 34

FOUR—If the law allows judicial review of the draft board determination in defense to an indictment, it was not harmless error to deny entirely petitioner's right to have the court pass upon the issue of the validity of his defense 37

Page

FIVE—This court should hold that the district of South Dakota does not have venue of the prosecution in order to avoid a construction of the Act and Regulations that deprives petitioner of his evidence and requires him to do an unreasonable act which puts him in a predicament and a trap contrary to the Fifth and Sixth Amendments to the Constitution 37

Conclusion 43

CASES CITED

Aderhold v. *Soileau*, 67 F. 2d 259 (C. C. A.-5) 26

Anniston Mfg. Co. v. *Davis*, 301 U. S. 337, 351-352 42

Bayless v. *United States*, 141 F. 2d 578 (C. C. A.-9), cert. den. 322 U. S. 748 26

Billings v. *Truesdell*, 321 U. S. 542, 546, 553-554, 555, 556, 557, 558-559 ..... 19, 22, 38

Burrus, In re, 136 U. S. 586 30

Estep v. *United States*, No. 292, Oct. Term, 1945 (and *Smith* v. *United States*, No. 66, Oct. Term, 1945), pending as argued in this Court, Nov. 7, 1945 ..... 16, 33, 34, 36

Joint Brief for Petitioners: pages—

54-105 14

69-72 30

105-131 34

131-190 34

173-190 36

190-194 37

APPENDIX to Joint Brief for Petitioners, pages 28a-57a, 71a-73a 36

Falbo v. *United States*, 320 U. S. 549, 553 ..... 17, 18, 22

Gies v. *United States*, 143 F. 2d 633, 635 (App. D. C.), affirmed, *per curiam*, by an equally divided court, 323 U. S. 682 26

Harrison v. *Vose*, 50 U. S. 372, 378 42

Hirabayashi v. *United States*, 320 U. S. 81, 109 26

Hull, United States ex rel., v. *Stalter*, — F. 2d — (C. C. A.-7), decided Nov. 6, 1945, affirming 61 F. Supp. 732 35

Page

Kerekes, Ex parte, 274 F. 870 (E. D. Mich.) 27
Romano, Ex parte, 251 F. 762 (D. Mass.) 27
Sibbach v. *Wilson & Co.*, 312 U. S. 1, 16 30
Smith v. *United States*, No. 66, Oct. Term, 1945 (and *Estep* v. *United States*, No. 292, Oct. Term, 1945), pending as argued in this Court, Nov. 7, 1945, 16, 30, 33, 34, 36

Joint Brief for Petitioners: pages—
54-105 14
69-72 36
105-131 34
131-190 34
173-190 34
190-194 37

APPENDIX to Joint Brief for Petitioners, pages 28a-57a, 71a-73a 36
Tinkoff, Ex parte, 254 F. 912 (D. Mass.) 27
United States v. *Anderson*, No. 447, Oct. Term, 1945, pending in this Court (60 F. Supp. 649, DC-W-Wash.) 37
United States v. *Jerome*, 130 F. 2d 514, 519, cert. den. as to this point, 317 U. S. 606 26
United States v. *Johnson*, 323 U. S. 273 39
United States v. *Kirby*, 7 Wall. 482, 486-487 42
United States v. *Shackford*, 5 Mason 445, 450 42
United States ex rel. Hull v. *Stalter*, — F. 2d — (C. C. A.-7), decided Nov. 6, 1945, affirming 61 F. Supp. 732 35
Ver Mehren v. *Sirmyer*, 36 F. 2d 876 27, 30

STATUTES CITED

Judicial Code, Sec. 240 (a) as amended by Act of February 13, 1925 1
Rules, Criminal Appeals (May 7, 1934), Rules XI and XIII 1
United States Code, Title 50:
Section 226 (40 Stat. 76, "Selective Service Law of 1917") 26

Page

App. Secs. 301-318 ["Selective Training and Service Act of 1940"— Section —]:
3a 2
5d 2
10a 2
11 2
United States Constitution:
Article I, Sec. 9, Clause 3 4
Article III, Sec. 2, Clauses 1-3 2
Amendment V 4, 11, 34, 42
Amendment VI 4

SELECTIVE SERVICE MATERIAL CITED

Regulations (32 C. F. R. Supp. 601.5 et seq.), Section—
601.5 2
622.44 2
622.51 2
623.1 2
623.2 2
623.21 2
623.61 2
625.1 2
625.2 2
626.1 2
627.12 2
627.24 2
629.1-629.35 2
633.2 2
633.12 2
633.21 2
642.41 2
642.42 2
651.1-651-8 2
651.10 2
651.2 2
651.3 2
651.7 2

Page

651.8 2
651.10 2
652.1 2
652.2 2
652.11 2
652.12 2
652.13 2
653.11 2

Miscellaneous Citations

Almighty God, Word of [The Bible]:

Acts 18:3 35
Acts 20:33-35 35

SUPREME COURT OF THE UNITED STATES

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TAZE HAMRICK GIBSON,

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THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITIONER'S BRIEF

Jurisdiction

This Court has jurisdiction of this case under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934. The judgment of the Circuit Court of Appeals was entered June 15, 1945. [96] [1] Petition for writ of certiorari

[1] All figures in this brief appearing in brackets denote pages of the printed record.

was filed July 13, 1945, and was granted October 22, 1945. [101]

Opinion Below

The opinion of the Circuit Court of Appeals appears in the record. [92-95] It is reported at 149 F. 2d 751.

Statute and Regulations Involved

Sections 3 (a), 5 (d), 10 (a) and 11 of the Selective Training and Service Act of 1940, as amended (50 U. S. C., App. §§ 301-318) are drawn in question here, together with Sections 601.5, 622.44, 622.51, 623.1, 623.2, 623.21, 623.61, 625.1, 625.2, 626.1, 627.12, 627.24, 629.1-629.35, 633.2, 633.21, 642.41, 642.42, 651.2, 651.3, 651.7, 651.8, 651.10, 652.1, 652.2, 652.11, 652.12, and 652.13 of the Selective Service Regulations (32 C. F. R. Supp., 601.5 *et seq.*), promulgated by the President under said Act.

Constitutional Provisions Involved

Clause 3 of Section 9 of Article I prohibiting enactment of bills of attainder. Clauses 1 to 3 of Section 2 of Article III investing the judicial powers. The Fifth and Sixth Amendments guaranteeing the rights of defendants in criminal prosecutions and securing due process of law.

Questions Presented

1. Does reporting at the civilian public service camp pursuant to order and refusing to stay after acceptance upon a physical examination constitute exhaustion of the administrative process so as to qualify petitioner for a defense that the action of the administrative board is illegal, where he is charged with desertion from a civilian public service camp?

2. Did the trial court err in holding that it could not consider the illegal and unconstitutional action of the draft boards and in limiting the issue to be decided by the court to whether or not petitioner knowingly failed to stay at the camp as specified in the order to report?

3. Did the courts below err in construing the Act so that the only method of attack against an illegal and unconstitutional action of the draft board was by application for writ of habeas corpus?

4. Where there is undisputed evidence that the petitioner is a minister of religion within the meaning of Section 5 (d) of the Selective Training and Service Act and petitioner is classified as liable for training and service upon grounds not allowed by the Act, may he show in defense to the indictment that the administrative agency acted illegally and unconstitutionally in denying his exemption from training and service?

5. May the petitioner who is a minister of religion, exempt from all training and service by provision of the Act, show in defense to the indictment that his constitutional rights have been violated by the board's action in excess of its jurisdiction or authority and contrary to the Act and Regulations?

6. Did the trial court err in refusing petitioner the right to show, and in refusing to consider, that the order on which the indictment was based is void because petitioner is a minister of religion exempt from all training and service for the reason that it was made (a) in excess of authority of the boards, (b) beyond the jurisdiction of the boards, (c) contrary to law, (d) contrary to the undisputed evidence, (e) without support of substantial evidence, (f) arbitrarily and capriciously, (g) contrary to the Constitution

by depriving petitioner of his rights and liberty without due process of law, and (h) in violation of the Act and Regulations?

7. Does the construction placed upon the Act and Regulations by the court below, requiring petitioner to report and stay at the camp, and apply for a writ of habeas corpus as a condition precedent to judicial review of the illegality and unconstitutionality of the action by the board, violate Clause 3, Section 9 of Article I, and Article III, of the United States Constitution and the Fifth and Sixth Amendments thereto?

8. Did the courts below commit reversible error in failing to hold that petitioner could not properly be tried in the district of South Dakota because venue was in the district of Arkansas where the controversy arose and all the witnesses resided?

9. Is the construction placed on the Act and Regulations requiring petitioner to go into another district to exhaust his administrative remedies under the Act, out of the district where the controversy arose and where the witnesses are situated, and there undergo trial for refusal to do service, unreasonable and unconstitutional because of placing an indigent defendant in a trap where his witnesses and evidence are unavailable?

10. Did the trial court err in denying petitioner's motion to quash the indictment, motion for a finding of not guilty and for a judgment of acquittal, in excluding proffered evidence, and in denying requests for findings of fact and conclusions of law, all of which pertained to the illegality of the administrative order?

Statement of Case

Form and History of Action

This criminal action was instituted in the District Court of the United States for the district of South Dakota by return of an indictment charging petitioner with violation of the Selective Training and Service Act of 1940, as amended, and the Regulations thereunder. [2-4] The indictment charges that petitioner, on August 23, 1944, reported at a civilian public service camp at Hill City, South Dakota, and was enrolled there for work of national importance. It is further alleged that on August 28, 1944, he left said camp with the intention of remaining away. The indictment charges that such conduct constituted a violation of section 11 of the Selective Training and Service Act of 1940, as amended (50 U. S. C. § 311). [2-3]

Before pleading to the indictment petitioner duly filed and presented his motion to quash the indictment. [8-15] It was overruled by the court. [19] Thereafter petitioner pleaded "not guilty" on February 13, 1945. [29] A trial by jury was waived and the case was heard by United States District Judge A. Lee Wyman, for the district of South Dakota. [29] The trial without jury began on February 13, 1945. [29] At the close of all the evidence, petitioner moved for dismissal of the indictment, a judgment of acquittal and a finding of "not guilty", stating extensively his reasons. [15-19] On denial of that motion petitioner excepted. [20, 77-78] At the close of all the evidence petitioner submitted to the court his requested findings and conclusions, all of which were refused and exceptions allowed. [78]

The court found petitioner guilty [21-22, 23-24, 78]. Petitioner excepted to the finding [22-23]. He was sentenced to five years and committed to the custody of the Attor-

ney General in such place of confinement as may be designated [24-25, 83]. Petitioner served and filed his written notice of appeal [25, 26, 27, 83]. He timely filed his assignments of error which supported each ground of his appeal. In due course the cause was argued and submitted to the United States Circuit Court of Appeals for the Eighth Circuit [96]. The judgment of conviction was affirmed by that court June 15, 1945 [96, 97].

Facts

Petitioner, now 23 years of age, registered under the Selective Training and Service Act of 1940 on June 30, 1942, with local board A of El Dorado, Arkansas [30, 64]. He was assigned order number 12064 with said board [30]. He timely filed, on October 12, 1942, a Selective Service questionnaire answering questions required of him and in Series VIII thereof he made declaration pertaining to his status as a minister of religion [30-31, 64].

In his questionnaire he stated:

"I have completed 8 years of elementary school and 1 year of high school. I have had the following schooling other than elementary and high school: Divinity school; course of study, Ministry; have attended a full two years and still attend.

"The job I am now working at is minister of religion. I do the following kind of work in my present job: Preaching the Kingdom of God for which Jesus taught his followers to pray (Matthew 6:10).

'I have also worked at the following occupations other than my present job, during the past 5 years: Farm laborer, farming from 1934 to 1940. My usual occupation, or the occupation for which I am best fitted, is ministry work.

'I prefer the following kind of work: Ministry work. I would not consider accepting a job which would require me to move away from my present home.

'I am a minister of religion. I do customarily serve as a minister. I have been a minister of Jehovah's witnesses since June 1938. I have been formally ordained. My ordination was performed on September 9, 1938 by Brother Miller at Birmingham, Alabama. I am a student preparing for the ministry in a theological or divinity school. I am attending the Watchtower Bible and Tract Society, which was established before September 16, 1939, and is located at 117 Adams Street, Brooklyn, New York'' [30, 31, 64] (Government's Exhibit 1).

Petitioner in his questionnaire claimed classification of IV-D, the classification given ministers of religion under Section 5(d) of the Act. He showed that he devoted substantially full time to the performance of his work as a minister of religion [30, 64].

The local board, on November 6, 1942, denied his claim for exemption and placed him in Class I-A, as liable for training and service in the armed forces [30]. He duly and timely appealed [30]. The board of appeal, on May 8, 1943, upon consideration of his draft board file, reversed the classification of the local board and placed petitioner in Class IV-E, thereby denying his claim for exemption from training and service as a minister of religion under Section 5(d) of the Act and making him liable for service in a civilian public service camp as a conscientious objector [30] (Government's Exhibit No. 1).

Petitioner wrote to the State Director and requested him to appeal the determination to the President and to stay the induction process [50-51, 69]. The State Director did not take action. The National Director was requested to take action in behalf of petitioner by appealing the determination to the President [50-51, 69]. On a review of the case, the National Director refused to take an appeal [69]. On May 23, 1944, petitioner was assigned to do work in a civilian public service camp [30, 31]. On

or about September 1, 1943, petitioner was commanded to appear on September 22, 1943, for a preinduction physical examination [51, 69]. In 1944 he was again given such an examination and later notified by his local board that he had been found "physically fit" and accepted for "civilian public service" [51-52, 69].

On August 8, 1944 the local board mailed to him an Order to Report for Work of National Importance, that commanded him to appear at the local board in Carlinville, Illinois, at 2 p. m. on August 21, 1944 [30, 31, 69]. On that date petitioner did appear at that local board and received his transportation to the camp in South Dakota [30, 70]. Thereupon the petitioner proceeded from the local board to the Civilian Public Service Camp at Hill City, South Dakota, where he remained until August 28, 1944, when he was given a physical examination [30-31, 70]. On arrival at the camp petitioner found that the camp director and camp physician were away [70]. After staying at the camp three days without performing any work whatever, petitioner finally saw the camp physician upon his return [70-71]. He was examined and found physically acceptable, thus completing his administrative remedies [70-71]. He did not report to do work of national importance [22, 30]. The civilian public service camp reported that petitioner appeared at the camp to complete the administrative processes incident to induction (Petitioner's Exhibit A) [33-34]. The camp records also showed that petitioner was a missionary evangelist engaged in preaching the gospel of God's kingdom as a direct representative of the Watchtower Bible and Tract Society and that he was ordained in 1938 and had been engaged in the ministry work full time since 1940 (Petitioner's Exhibit C) [36]. The report of the examining physician was received in evidence and showed that petitioner had been

declared acceptable and found to be physically fit (Petitioner's Exhibit D) [36].

After exhausting his administrative remedies on the completion of the physical examination petitioner talked to the camp director immediately after arrival of the director at the camp [33, 71]. The first thing petitioner did was to hand to the director a typewritten letter reviewing the history of his work as a minister and the history of his efforts to obtain an exempt classification as a minister of religion from the draft boards [33, 71]. Petitioner then told the director that he was in a covenant with Almighty God JEHOVAH to do His will by preaching the gospel of God's Kingdom, which must be proclaimed to all nations. He also informed the director that he did not ask the draft boards to give him a "conscientious objector" classification, but that the undisputed evidence in his draft board file showed he should have been given the exempt classification of IV-D which is given to all ministers of religion [33-34, 71-72]. Moreover, he pointed out that he had obeyed every order of the boards including their unlawful order to report to the camp [70-71]. He further informed the director that, as stated in the letter, he could not stay at the camp [31-34, 71-72]. The director told him that he would be prosecuted if he left the camp [31-38, 74-75]. Petitioner replied that if he was it would not be the first time a Christian had been punished for following Christ Jesus; that Christ Jesus had been unlawfully charged, tried and convicted because of keeping His covenant with Jehovah God, as well as His apostles; that since Jesus' apostles refused to step aside from their preaching work and follow the command of the governments of their day, so also he (petitioner) as a Christian must follow in their footsteps [74-75]. He also pointed out to the director that he must obey God rather than the unlawful

commands of the draft boards and the operators of the camp; that he stood in the same position of the three Hebrews who, when ordered to bow down and worship the golden image in ancient Babylon, firmly refused and for such refusal were thrown into the burning fiery furnace [74-75]. Petitioner said that he would say, as did the three faithful Hebrews, that if God sees fit to deliver him he will do so but that *if God sees fit not to deliver* him he, nevertheless, will continue to obey God regardless of the consequences [74-75].

Before leaving, petitioner told the camp director that he had reported to the camp only to exhaust the administrative process in order to obtain correction of the illegal classification of the draft boards [38-39]. He then asked the director to give him a statement showing that he had reported in camp on August 23, 1944 and that after completing the administrative process, without performing any work, he left the camp voluntarily (Petitioner's Exhibit E) [33-34]. Upon receiving this statement from the director, petitioner left the camp [33-34, 38-39].

Thereupon petitioner returned to his missionary field and resumed his evangelistic ministry in Indiana. He was arrested by an agent of the Federal Bureau of Investigation on December 2, 1944 under a charge of violating the Selective Training and Service Act of 1940 [44, 45-46, 65].

Petitioner testified that he attended a divinity school, preparing to become a minister of the Watchtower Bible and Tract Society and Jehovah's witnesses, a religious organization recognized by the Selective Service System, from 1935 to 1938 [61]. That he had been a minister of that organization since 1938 and that he had been a full-time pioneer minister, devoting substantially his full time, since the fall of 1940 [61-62]. That he was engaged primarily in carrying out his Christian duties as a minister

of the gospel by engaging in evangelistic work of calling upon the people from house to house, locating people of good-will toward Almighty God and the work of Jehovah's witnesses and in arranging for conduct of Bible studies in homes of the people interested in that work, and by public street preaching by distribution of literature containing Bible sermons, in Macon, Mississippi; El Dorado, Arkansas; Enid, Oklahoma; Verdun, Illinois; and Clinton, Indiana [59-66]. That he also performed regular ministerial duties in connection with the congregation of Jehovah's witnesses located in El Dorado, Arkansas, where he each week delivered sermons and performed ministerial duties to that congregation as its minister and as assistant to the presiding elder of the congregation [59-63, 64, 65-66].

How Issues Raised

By motion to quash, petitioner challenged the constitutionality of the criminal sanctions clause of the Act because if the only means of challenging the illegality of the action of the draft boards was by writ of *habeas corpus*, it deprived him of his constitutional rights of due process and converted the Act into a "bill of attainder" contrary to the Constitution [9]. Moreover, in the same motion he asserted that the Act and Regulations had been construed so as to require him to report in South Dakota to exhaust his administrative remedies, forcing him to stand trial in a strange, far-away district and State where the controversy did not arise, making it impossible for him to obtain compulsory subpoena powers over his witnesses, all of which was arbitrary, unjust, unreasonable and depriving him of his rights and liberty without due process of law, contrary to the Fifth Amendment to the United States Constitution [8-11]. The motion to quash was overruled, to which petitioner excepted [19, 29].

Although the trial court allowed the Government to introduce into evidence the questionnaire, documentary evidence attached to it by petitioner was excluded from evidence [31, 48-52]. All material and relevant documents filed in petitioner's cover sheet with the draft board that were considered by the administrative agency in arriving at his final classification, whereby he was denied his exemption from duty as a minister of religion, were identified and offered in evidence [48-52, 52-56]. These various documents were excluded from the evidence by the trial court despite the fact that they were offered to show that the order on which the indictment was based was illegal, arbitrary and capricious, *ultra vires*, without jurisdiction, contrary to law, without support of any substantial evidence, contrary to the undisputed evidence, and contrary to the due process clause of the Fifth Amendment [48-56]. Exception was duly taken to the action of the trial court in excluding this documentary evidence [56-57]. Petitioner requested the court to try the issue of his exemption from duty and want of authority of the draft board *de novo* [47-48, 57-58, 66-68]. He offered his own testimony, as well as that of another witness [57-58, 66-68]. By the *de novo* evidence thus offered he attempted to prove that he performed his work as a minister of religion without commercial gain; that he was an ordained minister of religion; that he stood in relation to congregations of Jehovah's witnesses as do ministers of the popular orthodox religious denominations [57-58, 66-68]. Moreover, he offered to show *de novo* that he regularly performed duties and ceremonies like those ordinarily performed by ministers of the orthodox religions, such as baptismal, memorial, burial, and other ceremonies usually performed only by ministers of religion [57-58, 66-68]. Additionally, petitioner offered to show that he was recognized by others of Jehovah's witnesses and by other persons not Jehovah's witnesses as

standing in the same relation to the Watchtower Bible and Tract Society and Jehovah's witnesses as do the regular and ordained ministers of orthodox religions [57-58, 66-68]. This evidence offered for the purpose of review *de novo* was excluded by the trial court, to which exception was duly taken and allowed [59, 69].

Petitioner duly urged his motion for dismissal of the indictment and for judgment of acquittal at the close of all the evidence [15-19, 77-78]. The grounds of the motion were that the undisputed evidence showed that the draft board order was void because the administrative agency had acted contrary to the Act, the Regulations and the due process clause of the Fifth Amendment in ordering petitioner to report for work of national importance. Additional grounds were urged [15-19]. The motion was denied with exception to petitioner [20].

Petitioner duly requested findings of fact and conclusions of law urging the court to find that the administrative order on which the indictment was based was illegal and void [78]. These requests were overruled, to which exceptions were allowed [78]. To the formal finding of guilty and written findings of fact made by the trial court the petitioner duly objected and excepted [22-23].

Specification of Errors

Petitioner relies upon every one of his assignments of error duly filed in the trial court as grounds for reversal of the judgment of conviction.

Points for Argument

ONE

A sensible construction of the Act and reasonable application of the Constitution require that petitioner be allowed to challenge the validity of the administrative action supporting the judgment of conviction in defense to the indictment.

A

The Act should be construed so as to allow a registrant who has been declared acceptable by the Civilian Public Service Camp and who is charged with violation of Section 11, to make a defense to the indictment, that the administrative action is illegal, and not to require him to remain at camp and apply for a writ of habeas corpus to review the illegality of the determination or action of the draft boards.

B

A reasonable interpretation of the Constitution compels a construction of the Act allowing petitioner his defenses to the indictment so as to avoid the Act's abridging the Constitution.

I. IF THE ACT IS CONSTRUED SO AS TO DENY A CHALLENGE OF THE VALIDITY OF THE ADMINISTRATIVE ACTION IN DEFENSE TO THE INDICTMENT BASED THEREON, PETITIONER WILL BE DENIED HIS RIGHT TO DUE PROCESS, JUDICIAL TRIAL, AND RIGHT OF TRIAL BY JURY, CONTRARY TO ARTICLE III AND THE FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION.

II. IF THE ACT IS CONSTRUED SO AS TO DENY A CHALLENGE OF THE VALIDITY OF THE ADMINISTRATIVE ACTION IN DEFENSE TO THE INDICTMENT BASED THEREON, THE ACT WILL BE TRANSFORMED INTO A BILL OF PAINS AND PENALTIES CONTRARY TO ARTICLE I, SECTION 9, CLAUSE 3 OF THE CONSTITUTION.

TWO

A sensible construction of the Act requires that orders of draft boards should be invalidated when it appears that they are made in excess of jurisdiction, without support of any evidence, contrary to the undisputed evidence, arbitrarily and capriciously, or when there has been a violation of the rights of procedural due process as to persons exempt from duty under the Act.

THREE

It was reversible error for the trial court to refuse petitioner the right to challenge the legality of the action of the administrative agency by its denying petitioner his claim for exemption from training and service, which action was in violation of the Act, the regulations and the due process clause of the Fifth Amendment to the Constitution.

FOUR

If the law allows judicial review of the draft board determination in defense to an indictment, it was not harmless error to deny entirely petitioner's right to have the court pass upon the issue of the validity of his defense.

FIVE

This Court should hold that the District of South Dakota does not have venue of the prosecution in order to avoid a construction of the Act and regulations that deprives petitioner of his evidence and requires him to do an unreasonable act which puts him in a predicament and a trap contrary to the Fifth and Sixth Amendments of the Constitution.

ARGUMENT

ONE

A sensible construction of the Act and reasonable application of the Constitution require that petitioner be allowed to challenge the validity of the administrative action supporting the judgment of conviction in defense to the indictment.

A

The Act should be construed so as to allow a registrant who has been declared acceptable by the Civilian Public Service Camp and who is charged with violation of Section 11, to make a defense to the indictment, that the administrative action is illegal, and not to require him to remain at camp and apply for a writ of habeas corpus to review the illegality of the determination or action of the draft boards.

B

A reasonable interpretation of the Constitution compels a construction of the Act allowing petitioner his defenses to the indictment so as to avoid the Act's abridging the Constitution.

I. IF THE ACT IS CONSTRUED SO AS TO DENY A CHALLENGE OF THE VALIDITY OF THE ADMINISTRATIVE ACTION IN DEFENSE TO THE INDICTMENT BASED THEREON, PETITIONER WILL BE DENIED HIS RIGHT TO DUE PROCESS, JUDICIAL TRIAL, AND RIGHT OF TRIAL BY JURY, CONTRARY TO ARTICLE III AND THE FIFTH AND SIXTH AMENDMENTS TO THE CONSTITUTION.

II. IF THE ACT IS CONSTRUED SO AS TO DENY A CHALLENGE OF THE VALIDITY OF THE ADMINISTRATIVE ACTION IN DEFENSE TO THE INDICTMENT BASED THEREON, THE ACT WILL BE TRANSFORMED INTO A BILL OF PAINS AND PENALTIES CONTRARY TO ARTICLE I, SECTION 9, CLAUSE 3 OF THE CONSTITUTION.[2]

[2] This point has been exhaustively argued in Joint Brief for petitioners, *Smith* v. *United States* (No. 66 Oct. Term 1945) and *Estep* v. *United*

The Selective Training and Service Act of 1940 (§ 3a) in part provides: "* * * no man shall be inducted * * * until he is *acceptable* to the land or naval forces * * * and his physical and mental fitness for such training and service has been satisfactorily determined." (Italics added.) The administrative process beginning "with registration with the local board" ends "when the registrant is *accepted* by the Army, Navy or civilian public service camp". *Falbo* v. *United States*, 320 U. S. 549.

Although under the Regulations, as they existed in August 1944 when petitioner was ordered to report for work of national importance, there was no opportunity for a change of classification after the preinduction physical examination, yet it was necessary for petitioner to report at the camp and undergo the physical examination given by the camp in order to finalize and complete his acceptance at the camp under the Act and Regulations. The order commanded him to report at the camp. The Regulations required that he be examined at the camp. His examination enabled the camp to accept him and to complete the selective process.

Section 629.1 of the Regulations provides that every registrant must be given a preinduction physical examination, which is a final-type physical examination for registrants classified as conscientious objectors (Reg. 651.1–651.8). If the conscientious objector is found physically fit, he is then assigned by the National Director of Selective Service to a designated civilian public service camp (Reg. 651.10, 652.1, 652.2) [30, 31]. Pursuant to such assignment, the local board issues the order to report for work of national

States (No. 292 Oct. Term 1945). Reference is here made to such argument as though incorporated at length herein. See that brief, pages 54-105. Additional points are urged by the Government in this case that require discussion in order to properly present petitioner's submission as to the law to be applied in this case. The differences between this case and the *Smith* and *Estep* cases are not sufficient to justify the application of a different rule.

importance. After the conscientious objector has been given a preinduction physical examination and has been assigned to a particular camp by the National Director, the local board then orders him to report at the board for transportation to the civilian public service camp to which he is assigned (Reg. 652.11). The Regulations provide that after arrival at the camp the registrant shall be examined to ascertain whether there has been a change in his physical or mental condition. But irrespective of the result of the physical examination he is accepted by the camp for work of national importance (Reg. 653.11). He cannot be rejected at the camp. If a change in his condition is found, he is hospitalized. The Regulations provide that the acceptance shall be noted after the physical examination. The camp director is required to place on the form a statement that the registrant is accepted for work of national importance at the civilian public service camp to which the registrant has been assigned. The statement shall specify the date and place of such acceptance and shall be signed by the camp director (Reg. 653.11). This is the same procedure which was being practiced pursuant to the Regulations at the time that Falbo (petitioner in *Falbo* v. *United States*, 320 U. S. 549) was ordered to report for induction.[3]

However, the Government says that procedure differs now from that which prevailed at the time Falbo was ordered to report for induction, in that the registrant is not required to pass the physical examination given at the camp before he is accepted. (See Note 4 of the Memorandum in opposition to petition for writ of certiorari in this case; also compare therewith Note 6.)

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[3] Compare the statement of this court in *Falbo* v. *United States*, 320 U. S. 549: "The selectee may still be rejected at the induction center and the conscientious objector who is opposed to noncombatant duty may be rejected at the civilian public service camp." See also Note 7, Opinion, *Falbo* v. *United States*, *supra*.

For all practical purposes, in determining whether or not the petitioner has exhausted his remedies, the procedure now is substantially the same as it was at the time Falbo was ordered to report for induction. Under the present Regulations acceptance is predetermined upon the final-type preinduction physical examination, but is not completed until the registrant is examined at the camp (Reg. 653.11). While now acceptance of a registrant is mandatory upon the physical examination at the camp, it was not thus at the time Falbo was ordered to report for work of national importance. While Falbo could be accepted at the camp, he could not, under the Regulations, be forthwith rejected. The Regulations required that the registrant who was not accepted be detained at the camp until the National Director of Selective Service had decided whether or not he would be "retained in the camp or hospitalized". Since acceptance under the Regulations as they exist now cannot be finalized until the registrant reports at the camp and undergoes the preinduction physical examination, under the doctrine of the *Falbo* decision Gibson could not exhaust his remedies until he had been accepted.

It should be observed that there is not a ceremony of induction at a civilian public service camp, which is separate from the selective process. In this respect the procedure for the processing of conscientious objectors into civilian public service camps is dissimilar to the procedure that prevails for registrants ordered to report for induction into the armed forces. *Billings* v. *Truesdell*, 321 U. S. 542, 553-554.

The procedure prescribed by the Regulations was pursued in petitioner's case. He underwent the preinduction physical examination and his fitness for work of national importance was determined [51, 52, 69]. The National Director of Selective Service assigned him to the civilian pub-

lic service camp at Hill City, South Dakota [30, 31]. On August 8 order issued commanding him to report on August 21, 1944 at his local board for transportation to a civilian public service camp to do work of national importance [30, 31, 69]. Petitioner reported and was transported to the camp. Although he was under jurisdiction of the camp to which he was assigned on his entraining for camp, he was not accepted until August 28, 1944, five days after his arrival on August 23, 1944 (Reg. 653.11) [33, 35, 70]. He was, however, enrolled on arrival at the camp August 23, 1944 [30, 33, 70]. He did not fully complete the administrative selective process until he completed the physical examination on August 28, 1944. After his acceptance he tendered the camp director a letter explaining that he reported solely to exhaust his administrative remedies and that he refused to do work of national importance because he had been illegally classified by the Selective Service System. He thereupon left the camp without performing any work or doing anything required of him at the camp [70-71].

When petitioner was ordered to report for work, and he appeared both at the local board and at the camp and refused to work after being examined, he was at that time in exactly the same position as was Billings in the *Billings* case (321 U. S. 542), after Billings had been examined and found acceptable and ordered to submit to induction.

Billings refused to submit to induction.

Gibson refused to submit to "induction."

The lower court's decision, reduced to its lowest factor, holds, on authority of the *Falbo* case, that the legality of the draft boards' proceedings and orders cannot be challenged in any manner in the courts in defense to an indictment. The *Billings* case is said to be wholly irrelevant to any issue presented by Gibson. Both of those conclusions are erroneous, and both grow out of an inade-

quate cognition of one key sentence appearing on page 558 of the *Billings* opinion, to wit:

> "Moreover, it should be remembered that he who reports at the induction station is following the procedure outlined in the *Falbo* case for the exhaustion of administrative remedies."

The difference between the construction placed on this sentence by the court below and the position of Gibson may be illustrated by interpolating the sentence and viewing it in parallel form:

"Moreover, it should be remembered that he who reports at the induction station [at the civilian public service camp for work of national importance and remains there] is following the procedure outlined in the *Falbo* case for the exhaustion of administrative remedies."	"Moreover, it should be remembered that he who reports at the induction station [*to determine acceptance by physical examination* by the camp physician] is following the procedure outlined in the *Falbo* case for the exhaustion of administrative remedies."

If the interpolated sentence appearing at the left, above, represented a corrected statement of what the court said in the *Billings* case, then petitioner would readily concede that the court had verily closed the door of the judiciary to all registrants who had not remained at civilian public service camps, as the court below says it has done. But in truth and in fact this court has not held in the *Falbo* case that a registrant must first stay at a civilian public service camp before he can obtain judicial review of his rights under the Selective Training and Service Act. The interpolated sentence appearing at the right, above, truly expresses the holding of the *Billings* case and undeniably constitutes a clarification of the crucial question in the

Falbo case, which was simply this: "At what point in the selective process can it be said that a registrant has exhausted his administrative remedies so as to entitle him to judicial review of the legality of the selective process?" An examination of the words in the *Billings* opinion will show beyond question that the court has answered this question by drawing the line for the exhaustion of administrative remedies squarely between the separate and distinct steps of "*acceptance*" and actual *induction*. In the *Falbo* opinion the significant words are: "The connected series of steps into the national service which begins with registration does not end until the registrant is *accepted* by the army, navy, or civilian public service camp," *Falbo* v. *United States*, 320 U. S. 549, 553. See *Billings* v. *Truesdell*, 321 U. S. 542, 546, 553, 554, 555, 556, 558-559.

In considering the *Billings* decision (321 U. S. 542), it must be kept in mind that Billings was required to report at the induction station under the old regulations which provided that induction should immediately follow the acceptance on preinduction physical examination. In order to preserve Billings' right to follow the procedure outlined in the *Falbo* case (i. e., complete the "selective process" by being accepted upon the final or "preinduction" physical examination) and thereby put himself into position to obtain judicial review of his claim that the boards' treatment of his statutory and constitutional rights was illegal, it was necessary for the court to say, as it has, that his mere reporting to the induction station to submit to the preinduction physical examination could not of itself constitute induction, because such would defeat the very purpose of his submitting to this examination in that it would take him out of the jurisdiction of the civil courts and put him under the military tribunals thereby depriving him of the benefit of Senator Bone's amendment to Section 11 of

the Act which provides for the prosecutions of Selective Service violators in the civil and not military tribunals. As the court observed (in the *Billings* opinion), any other view would indeed make a "trap" out of the procedure outlined in the *Falbo* case for the exhaustion of administrative remedies, in that it would require a registrant to exhaust his administrative remedies by being accepted on preinduction physical examination in order to obtain judicial review of his grievances in the civil courts, and then, by his very act of submitting to this examination, allow him to be taken out of civil jurisdiction altogether and put him under military jurisdiction. No other satisfactory explanation of those words has been advanced or can be advanced.

In the instant case, certainly the view taken by the Government, that a registrant must stay at a civilian public service camp before judicial review is possible, makes the court's words above quoted entirely meaningless; for what would be the purpose in "exhausting his administrative remedies" if, after having done so, he would still be denied the right to judicial review on the ground that he had not stayed at the civilian public service camp? If the Government's view is correct, then the registrant who stays away from the camp physical examination altogether would be in no worse position than he who reported to the induction station for the examination as outlined in the *Falbo* case, and this is precisely the dilemma the court sought to avoid creating in the *Billings* decision. If this be not the case, then words no longer have any meaning and no credence can be placed in any sober declaration in the English language.

That part of the *Falbo* decision to the effect that "a prompt and unhesitating obedience to orders issued in the selective service process is indispensable to the complete attainment of the object of national defense" does not

refer to that which the court below appears to suppose that it does. The court was expressly referring to the many intermediate steps that make up "the selective service process" and these words cannot be stretched into an inclusion of the separate and final step of staying at a civilian public service camp. How else besides in this manner can Justice Black's words in the *Falbo* opinion be explained: "Surely if Congress had intended to authorize interference with that [selective service process] by *intermediate* challenges of orders to report [for preinduction physical examination and similar interlocutory commands] it would have said so.

"* * * It is certain that Congress was not required to provide for judicial intervention before *final acceptance* of an individual for national service. The narrow question therefore presented by this case is whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process [which is, as above appears, final acceptance on physical examination]."

If there was ever any doubt as to whether the court, by its use of the phrase "final acceptance," was referring to acceptance upon final physical examination or acceptance by actual induction, that doubt was removed by the explanation made in the *Billings* opinion (p. 554) wherein it was clearly stated "*induction follows acceptance and is a separate process.*" The lower court's error in disposing of the *Falbo* case is that it has confused and confounded the word "acceptance" used in the *Falbo* opinion with "*induction.*" It is not disputed that Gibson had been finally "accepted" for service in the camp when he had completed his final physical examination by the civilian public service camp physician. This clearly distinguishes

his case from the "narrow question presented in the *Falbo* case.

There is no question that petitioner has exhausted his administrative remedies. This is conceded by the Government. It has said that "there can be no question of completing the administrative process, for the process had run its full course and petitioner was under the jurisdiction of the camp when he departed from the camp without authority. In this respect his position is no different from that of a registrant who has been inducted into the Army. Thus, the question the case presents is whether an inductee in the armed services or a conscientious objector who reports to a Civilian Public Service Camp may desert from the service or the camp, as the case may be, and thus lay a basis for challenging the propriety of his Selective Service classification." (See "Memorandum for the United States in opposition to the granting of petition for writ of certiorari," this case, pp. 7-8.)

Petitioner, insofar as exhaustion of administrative remedies is concerned, is therefore in exactly the same position as though he were before the court upon a petition for writ of *habeas corpus*. The only difference is the method in which the question is presented to the court. In a *habeas corpus* proceeding the question would be presented upon an affirmative move initiated by Gibson, who would request the court to pass upon the validity of the order to report. Here the civilian public service camp has invoked the order to report for work at the camp as ground for its jurisdiction, and by affirmative move requests the court to find that petitioner has defied that jurisdiction. The question for the court to decide is whether one who is illegally classified and ordered to do work of national importance must remain at the camp and then apply for a writ of *habeas corpus* as the only remedy.

Stated another way: The court must decide whether one who has exhausted his administrative remedies may be denied his right to challenge the validity of the order upon which an indictment is based, charging him with violating the Act for failure to remain at the camp and do work of national importance after having completed his administrative remedies.

The position of the Government is that by leaving the camp after having exhausted his administrative remedies petitioner defied the law and compelled the administrative authority to invoke the criminal sanctions clause of the Selective Training and Service Act against him. The Government says that petitioner "cannot test in that way the validity of the orders as applied to him." *Hirabayashi* v. *United States*, 320 U. S. 81, 109; *Giese* v. *United States* (App. D. C.) 143 F. 2d 633, 635, affirmed, *per curiam*, by an equally divided court, 323 U. S. 682. (See "Memorandum for the United States in opposition to the granting of petition for writ of certiorari," this case, pp. 8, 10.)

Moreover, the Government says that the course taken by Gibson is similar to that of a prisoner in a penal institution who has illegally escaped from custody and who, on being prosecuted for jail-breaking, is denied a defense to such prosecution on the ground that his sentence was irregular or voidable. The Government relies upon three cases.[4]

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[4] Memorandum in opposition to petition for writ of certiorari, p. 10: "Similarly, a prisoner in a penal institution cannot justify his escape because he is confined under an irregular or voidable sentence; despite the illegality of his imprisonment, he has committed a criminal offense. *Bayless* v. *United States*, 141 F. 2d 578 (C. C. A. 9), certiorari denied, 322 U. S. 748; *United States* v. *Jerome*, 130 F. 2d 514, 519, certiorari denied as to this point, 317 U. S. 606; *Aderhold* v. *Soileau*, 67 F. 2d 259 (C. C. A. 5). For other examples of situations in which, 'even in peacetime, the duty of the citizen to cooperate in effective law enforcement overrides his convenience,' see *Giese* v. *United States*, 143 F. 2d 633, 635 (App. D. C.), affirmed, *per curiam*, by an equally divided court, 323 U. S. 682." The district court decisions cited by the Government held,

The Government's assertion that the *Hirabayashi* decision is apposite here is spurious. The argument is wholly factitious. The question involved there was whether the curfew order was an unconstitutional delegation of authority and discriminatory. The validity of the exclusion order was not determined. The orders were made on a race or group basis. In that case there was no provision for individual demonstrative determinations. The law did not contemplate individual classifications. There was no provision for exhaustion of administrative remedies. There was nothing said in the Act or the order about administrative determinations respecting loyal citizens as compared with disloyal citizens of Japanese ancestry. It can be assumed that if the law or orders involved in the *Hirabayashi* case provided for exemption of loyal Japanese, or administrative determinations upon an individual basis as a condition precedent to invoking an exclusion order, then an inquiry thereof would have been permitted in a defense to an indictment of one charged with defying the exclusion order.

Even in the absence of an administrative determination on an individual basis, it must be assumed that if the Army did not have jurisdiction and authority over the particular individual or class of individuals, the person thus claiming want of authority could assert it in defense to an indictment based on his alleged defiance of the order. Suppose, in the *Hirabayashi* case that Hirabayashi were a Filipino or a Chinese who had been mistakenly included in the curfew

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under the 1917 Act, that deserters could not challenge the validity of draft board determinations and the validity of court-martial proceedings resulting from their desertion. (*Ex parte Romano*, 251 F. 762, 764 (D. Mass.); *Ex parte Tinkoff*, 254 F. 912 (D. Mass.); *Ex parte Kerekes*, 274 F. 870 (E. D. Mich.)) It should be observed that the United States Circuit Court of Appeals for the Eighth Circuit held, in *Ver Mehren* v. *Sirmyer*, 36 F. 2d 876, that the invalidity of the administrative action could be challenged by a deserter who had been court-martialed in spite of his defiance of the orders of the administrative agency and of the armed forces.

order or the evacuation order. It must be conceded that in such circumstance Hirabayashi, if a Chinese or Filipino (neither of which nationals was within the scope of the order), could prove his nationality and show that the order was *ultra vires* and in excess of the jurisdiction asserted by the armed forces. That is precisely the situation presented here. It would be a violation of due process to compel one not subject to administrative action to comply with it in order to question the want of authority of the administrative agency.

In the *Hirabayashi* case the defendant actually defied the curfew order and the evacuation order. Nevertheless this Court considered his defense that the curfew order was void. In that case the Government did not contend that the defendant was not entitled to raise and the court was not entitled to consider the defenses urged because he had not complied with the order. If a defense as to the *constitutionality* of a particular order can be considered on the ground that it involves a determination of the constitutionality of the curfew order, then with equal force of reason the *courts* can also construe the order or statute and consider whether the particular order is applicable to the facts or is illegal because contrary to the statute authorizing it, in that the person affected is *exempt* or the administrative agency *did not have jurisdiction*, without requiring that he comply with the order. It seems plain that if an order of an administrative agency is legal it should not and can not be flouted; but that if an order of such agency is illegal and void, then as a matter of fact it cannot place any citizen under an obligation to do anything. If the citizen chooses to ignore an invalid, unlawful order, no one would contend that he would be prevented from setting up this fatal defect in any subsequent prosecution that might be instituted against him.

The analogy between the action of the petitioner and that of an escaped convict is wholly factitious and syllogistic. It is based upon an assumption of fact that does not exist. Like a house built upon a foundation of sand, it appears to be apposite. Yet when subjected to the turbulent waters of truth, the foundation melts away and the structure of the argument collapses. In the case of an escaped convict charged with jail-breaking, the prosecution is not based upon the judgment and commitment that placed him in custody. The commitment is wholly collateral. The jail-breaking is incidental to the original judgment. Prosecution for jail-breaking is based upon a statute specifically prohibiting jail-breaking. Prosecution in the instant case is directly based upon alleged defiance of an administrative order which is directly challenged in the proceedings.

In the case at bar the administrative authority has been directly invoked by the civilian public service camp in delinquency proceedings through indictment charging petitioner with a violation of the administrative order. Petitioner says that the administrative order is void for want of jurisdiction of the camp and of an administrative agency. He says that the order is *ultra vires* and that it is wholly void. It is more than voidable. When the supposed analogy claimed by the Government between the act of the petitioner and that of an escaped convict is subjected to this test, it disappears as an illusion.

In cases involving prosecutions for prison breaks the prisoner is confined because of his violation of the law. In the case at bar the petitioner was confined at a civilian public service camp because he had to go there to exhaust his administrative remedies, on account of the violation of the law by the administrative agency. Since the board had no jurisdiction because he was exempt as a minister of religion from all training and service under the Act,

the camp had no jurisdiction. This can be shown in actions instituted under Section 11 of the Act to enforce the orders of the administrative agency.

The proceedings in the case at bar are more analogous to contempt proceedings based upon defiance of the order of court than the Government's "escaped convict" simile. The decision styled *In re Burrus* (136 U. S. 586) held that one who defied the order of a court could challenge the validity of the order on the grounds of want of authority, *ultra vires*, or excess of jurisdiction to make the order. See also *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 16.

Under the Selective Service Act of 1917 it was held that judicial review was not waived by reason of defiance of the administrative agency and violation of the orders of the armed forces by desertion. (*Ver Mehren* v. *Sirmyer*, 36 F. 2d 876) By force of the same reasoning, defiance of the administrative order and the choosing to depart ("desertion") from a civilian public service camp after reporting to such camp to exhaust administrative remedies, by one, like petitioner, who claims to be exempt as a minister of religion under Section 5 (d) of the Act, would not constitute a waiver of his challenge of the validity of the administrative action classifying him as liable for training and service. (See Joint Brief for petitioners, *Smith* v. *United States*, No. 66 Oct. Term 1945, and *Estep* v. *United States*, No. 292 Oct. Term 1945, pages 69-72.)

It cannot be argued that petitioner went too far by submitting to the jurisdiction of the civilian public service camp. This Court in the *Falbo* case held that a conscientious objector had to report to the civilian public service camp in order to exhaust his administrative remedies. (320 U. S. 549, 553) Under the Act and Regulations the acceptability of petitioner could not be finally accomplished until he had undergone the physical examination at camp.

He could not be examined by the camp physician until petitioner had reported at the camp. If, in order to avoid the assumption of jurisdiction by the civilian public service camp, he stayed away entirely by not reporting, his acceptance would never have been finalized.

It would be unreasonable and unjust to say that one classified as a conscientious objector would have to report at a camp in order to exhaust his remedies and then to say that if he did report and exhaust his remedies he would waive his right to challenge the validity of the order when he chose to depart from the camp after completing his administrative remedies. The fact that the physical examination would not accomplish his discharge from the camp does not change the proposition that he had to report in order to consummate his acceptance at the camp.

There was no "induction" ceremony. Neither the Act nor the Regulations provide for the drawing of a line at the camp as to just where jurisdiction began and ended. The Government asserts that the jurisdiction was assumed when the petitioner entrained for the civilian public service camp. (Reg. 652.13) [5] If this argument is true, then a registrant who entrains for a civilian public service camp but who changes his mind en route and does not complete the trip could be prosecuted for desertion under the Act and Regulations.

As in the case of registrants who are ordered to report for induction, the Act and Regulations are wholly silent concerning *habeas corpus* as the exclusive remedy for one ordered to report for work of national importance at a civilian public service camp. However, the Act and Regulations are explicit that the United States district courts shall have jurisdiction to enforce the Act and Regulations as to selectees and trainees at a civilian public service camp.

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[5] See "Memorandum for the United States in opposition", etc., p. 5.

Since the Act provides that its enforcement as to civilian public service camps shall be in the federal district courts, it seems only reasonable that if the civilian public service camps invoke the jurisdiction of one of such courts to enforce an administrative order made the basis of their jurisdiction, such order shall be subject to attack in the district court on the ground that the order was made in excess of the jurisdiction of the administrative agency.

It is utterly ridiculous to assume that Congress contemplated that a minister, a State Governor, or a judge, exempt under the Act from training and service, should be required to report for work of national importance, and remain at a civilian public service camp for months while the invalidity of the administrative action was being determined in a *habeas corpus* proceeding. It is equally fatuous to presume that Congress intended that *habeas corpus* to establish the invalidity of an administrative order was the only remedy.

It is inconsistent to say that Congress exempted ministers and judges and other specified public servants from duty and at the same time to say that Congress intended that such registrants would have to abandon their assigned duties in order to establish the invalidity of the administrative determination respecting their status under the Act. Congress said that exempted ministers belonged with their congregations. It is figmentary to argue that Congress intended that a minister would have to abandon his congregation and travel all the way across the country to report to and remain at some isolated civilian public service camp in the wilderness pending a final determination of a petition for writ of *habeas corpus* in the federal appellate courts if the district court should err.

The only reason that an exempt registrant is required to report for "induction" at a civilian public service camp

is to exhaust his administrative remedies. It is unreasonable to suppose that Congress intended that an exempt registrant should be required to perform work of national importance at such camp as a condition precedent to establishing the invalidity of the administrative determination. If the invalidity can be established upon a petition for writ of *habeas corpus* and it is denied in a trial of an indictment brought under Section 311 of the Act because of the contempt and defiance of the administrative agency, then there is a denial of judicial trial and the Act has been converted into a bill of pains and penalties, contrary to the "bill of attainder" clause of Article I of the Constitution.

TWO

A sensible construction of the Act requires that orders of draft boards should be invalidated when it appears that they are made in excess of jurisdiction, without support of any evidence, contrary to the undisputed evidence, arbitrarily and capriciously, or when there has been a violation of the rights of procedural due process as to persons exempt from duty under the Act.

This point has been fully argued, except for some additions and a new decision that has been rendered since October 1945, under point Four of the Joint Brief for petitioners, *Smith* v. *United States*, No. 66 Oct. Term, 1945, and *Estep* v. *United States*, No. 292 Oct. Term 1945. See pages 105-131. That argument is sufficient for the argument under this point. Reference is here made to such argument in that brief as though incorporated at length herein. Additional comment germain to this point will be found under the following point herein.

THREE

It was reversible error for the trial court to refuse petitioner the right to challenge the legality of the action of the administrative agency by its denying petitioner his claim for exemption from training and service, which action was in violation of the Act, the regulations and the due process clause of the Fifth Amendment to the Constitution.

This point has been fully argued, except for some additions and a new decision that has been rendered since October 1945, under point FIVE of the Joint Brief for petitioners, *Smith* v. *United States*, No. 66 Oct. Term 1945, and *Estep* v. *United States*, No. 292 Oct. Term 1945. See pages 131-190. That argument is sufficient for the argument under this point. Reference is here made to such argument in that brief as though incorporated at length herein.

On November 6, 1945, the United States Circuit Court of Appeals for the Seventh Circuit, in the case of *United States ex rel. Hull* v. *Stalter*, held that one of Jehovah's witnesses had been illegally classified and ordered him discharged from custody of the civilian public service camp. There that court held that the undisputed evidence showed that Hull was a full-time pioneer missionary evangelist. Although he was engaged in secular work at the time he filed his questionnaire, he later abandoned secular work and undertook the full-time pioneer missionary-evangelist work. He was engaged in that work at the time he was finally classified by the local board. Upon facts almost identical to the facts in the case at bar, the Circuit Court of Appeals in that case held that the action of the administrative agency flew in the teeth of all the evidence and was a violation of the due process clause of the Fifth Amendment. Reference is here made to such decision.

Although that decision was rendered in a case where review of the administrative determination was sought by a petition for writ of *habeas corpus*, nevertheless it should be apropos here. It should be observed that Hull, petitioner in that case, had been indicted, tried and convicted by the Federal District Court in Ohio for refusing to report to a civilian public service camp pursuant to order of the local board and in violation of Section 11 of the Act. The district court suspended imposing of sentence on condition that Hull would report to the camp and then apply for a writ of *habeas corpus*, following the decisions of several circuit courts of appeals to the effect that *habeas corpus* was the only remedy. Hull reported to the camp, according to the condition imposed by the court in suspending imposition of sentence. He applied for a writ of *habeas corpus* before the Federal District Court in Indiana. The writ was granted. He was discharged. *Hull* v. *Stalter*, 61 F. Supp. 732.

The action of the court in suspending sentence in the *Hull* case on condition that he report to the camp does not prove that *habeas corpus* is the only remedy. It merely establishes the fact that Hull did not complete the selective process.

In this case, the petitioner, at the time of his final classification in May 1943, had been engaged full-time in the pioneer missionary-evangelist work under direction of the Watchtower Bible and Tract Society for more than two years, except for such time as he obtained temporary leave in order to refinance himself by "making tents" as did the apostle Paul.—Acts 18:3; 20:33-35.

The activity of calling from house to house, as one of Jehovah's witnesses, to teach the people about God's kingdom and to help them obtain an education in the Bible, is not secular work nor is it church work done by a lay

worker. The Government and some judges have argued that the activity of Jehovah's witnesses is nothing more than the work of a lay worker of an orthodox church. This assertion and argument beg the question, are factitious and syllogistic, because assuming a fact that does not exist and applying an orthodox standard to a primitive dissentient and unorthodox organization that cannot be gauged by the yardstick of the popular clergy. Jehovah's witnesses perform their missionary evangelistic ministerial work as primitive Christian ministers. This they do from house to house and publicly. The fact that some lay workers who are not ordained ministers of the orthodox religious denominations do charitable work for such orthodox denominations in a similar manner does not prove that Jehovah's witnesses are lay workers rather than ordained ministers. The fact remains that Jehovah's witnesses are actually ordained according to the ceremonies and regulations of the Watchtower Bible and Tract Society and Jehovah's witnesses, and they are recognized as duly authorized and duly ordained ministers of the Watchtower Bible and Tract Society and Jehovah's witnesses. This cannot be set aside by the courts because the orthodox denominations employ a different method. (See argument made under point Five in Joint Brief for petitions, *Smith* v. *United States*, No. 66 Oct. Term 1945, and *Estep* v. *United States*, No. 292 Oct. Term 1945, pages 173-190.)

Moreover, the contention of the Government and of some judges, that the position of Jehovah's witnesses and others similarly situated is no different than that of those engaged in work done by a lay worker, is inconsistent with the views and opinions of the Selective Service System, authoritatively expressed on the subject. (See Appendix to Joint Brief for petitioners, *Smith* v. *United States*, No. 66 Oct. Term 1945, and *Estep* v. *United States*, No. 292 Oct. Term 1945, pages 28a-57a, 71a-73a.)

FOUR

If the law allows judicial review of the draft board determination in defense to an indictment, it was not harmless error to deny entirely petitioner's right to have the court pass upon the issue of the validity of his defense.

This point has been exhaustively argued in the Joint Brief for petitioners, *Smith* v. *United States*, No. 66 Oct. Term 1945, and *Estep* v. *United States*, No. 292 Oct. Term 1945, at pages 190-194, to which reference is here made. That argument is incorporated here as though copied at length herein.

FIVE

This court should hold that the District of South Dakota does not have venue of the prosecution in order to avoid a construction of the Act and regulations that deprives petitioner of his evidence and requires him to do an unreasonable act which puts him in a predicament and a trap contrary to the Fifth and Sixth Amendments to the Constitution.[6]

Before the case proceeded to trial in the court below the petitioner, by filing a motion to quash, challenged the authority of the Government to prosecute him in the District of South Dakota. He contended that, having an intention to leave after he had been examined at the camp, the only reason for his reporting at the camp as directed in the order was to exhaust his administrative remedies by undergoing a physical examination at the camp, thereby eliminating all doubt as to whether he had completed the selective process. This step was suggested by the Supreme Court in the *Falbo* decision. (See Note 7.)

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[6] Substantially the same question is presented to this court in *United States* v. *Anderson*, No. 447 Oct. Term 1945; see 60 F. Supp. 648 (DC-W. Wash.).

The controversy between the petitioner and his local board originated and was terminated within the administrative agency in the State of Arkansas. The draft board files showing jurisdiction over the defendant were located in Arkansas. These records, pursuant to stipulation of the parties, were produced from Arkansas without bringing the clerk of the local board to prove their content. All of the members of the boards that considered defendant-petitioner's rights under the Act reside in Arkansas. Also the State Director of Arkansas. All these witnesses were hundreds of miles from Hill City, South Dakota.

South Dakota was not the district where the controversy arose or where the order on which the indictment is based was issued. Therefore the alleged crime was not committed in South Dakota, because the order, the source of which was in Arkansas, that petitioner is alleged to have violated, commanded him not only to report. The Arkansas order also required petitioner "to remain in the camp and perform" his duties (Government's Exhibit 3). See also *Billings* v. *Truesdell*, 321 U. S. 542, 557-558. The order was issued by a local board in Illinois acting as an agent for the local board in Arkansas (Regs. Sec. 633.12).

Section 311, Title 50, United States Code (Selective Training and Service Act of 1940), providing for prosecutions in the district courts and for criminal sanctions, does not provide for venue. In absence of a specific provision for trial at a place other than where the violation occurred it must be assumed that Congress intended that a registrant should be tried in the district where the controversy arose, where the boards were situated, and where witnesses would be equally available to all parties.

Petitioner was forced to go to trial at a place remote from his home, remote from the board that classified him and that authorized him to be assigned to do work of na-

tional importance in a civilian public service camp, and thus he was far removed from his witnesses. This is especially harsh where a person reports to the camp for the purpose of exhausting his remedies. Petitioner did not go to the camp for the purpose of performing work. Having gone there to exhaust his remedies, he finds himself now in a trap. Although he has exhausted his remedies he cannot have witnesses to prove the illegality of the action of the administrative agency. Indeed, petitioner, being an indigent person, made application for subpoena for witnesses from Arkansas, including all the members of the boards and the officers in the office of the State Director of Arkansas, for the purpose of establishing that the administrative agency violated the Act and the Regulations in classifying petitioner. (See the application for the subpoena which appears in the record at pages 4-7.) The application was overruled [7-8].

The action of the court in overruling the motion to quash on this ground was contrary to the holding of this court in *United States* v. *Johnson*, 323 U. S. 273. There the defendant was indicted under the Federal Denture Act in the district of Maryland for putting articles in the mails at Chicago for delivery in Delaware. The court held that, in absence of an express provision for trial in a distgict other than where the articles were deposited in the mails, the statute must be construed so as to allow trial at a place "more consonant with the considerations of historic experience and policy which underlie those safeguards in the Constitution regarding the trial of crimes." The court also said: "If an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy even though not commanded by it.

* * * While it might facilitate the Government's prosecution in a case like this to have its witnesses near the place of trial, there must be balanced against the inconvenience of transporting the Government's witnesses to trial at the place of the sender the serious hardship of defending prosecutions in places remote from home (including the accused's difficulties, financial and otherwise, see R. S. sec. 878, 28 U. S. C. sec. 656, of marshalling his witnesses), as well as the temptation to abuses, already referred to, in the administration of criminal justice. Inasmuch as the statute permits and does not forbid this construction the judgment should be affirmed."

The *corpus delicti* of a violation of this Act involves the duty of the registrant to perform service (Sec. 311). If he has no duty he is not guilty. If he has exhausted his remedies he can show in defense to an indictment that he has no duty. If he can show in defense to the indictment that he has no duty it is necessary to produce the draft board members and others to show a violation of the Act by them and that he has no duty. If the validity of the draft board proceedings can be inquired into in defense to the indictment, then of necessity the place of trial should be at such place where the draft board is located.

Indeed the situation here is closely analogous to the condition brought under review of the court in the *Johnson* case, *supra* (323 U. S. 273). There the *corpus delicti* involved not only the mailing of the article in Chicago, its moving through other places in interstate commerce, and the ultimate delivery in Delaware. In this case the act which set in motion the events resulting in the indictment occurred before the boards in Arkansas. The process, beginning in Arkansas, traveled through many states and ultimately the defendant-petitioner was brought to rest in South Dakota. His steps took a course similar to the course taken by the package mailed in the *Johnson* case.

In that case it was more convenient to try the defendant in Delaware where the witness for the Government who had received the package was available. In the *Johnson* case it was a manifest hardship to the defendant to be put to trial so far from the place where all his witnesses were. In this case it was a manifestly more convenient move for the Government to try Gibson in South Dakota. Also in this case it was a manifest hardship to put Gibson to trial in South Dakota where it was impossible for him to have compulsory process over the members of the draft boards. In the *Johnson* case the statute was silent as to place of prosecution. In this case the statute is silent as to place of prosecution.

The mere act of leaving the camp in South Dakota did not constitute the entire *corpus delicti*. It was no more the entire body of the crime than was the delivery of the package in Delaware in the *Johnson* case. The leaving of the camp after exhausting his remedies was merely the end of a chain of events that was set in motion in Arkansas, as was the receiving of the parcel in Delaware in the *Johnson* case the end of the chain of events set in motion at Chicago. For the purposes of venue, the crime, if any, in this case was no more committed in South Dakota than was the crime, if any, in the *Johnson* case committed in the state of Delaware. It is submitted that the *Johnson* case is squarely in point and, upon the basis of it, the trial court should have sustained the motion to quash and ordered the indictment dismissed because the prosecution was instituted in the wrong district.

In event the court reaches the conclusion that this case is prosecutable in the district of South Dakota, then petitioner says that the court should hold that the construction placed upon the statute so as to place him in this trap of not being able to produce his witnesses is unconstitutional.

The construction placed upon the Act and Regulations in the *Falbo* case requiring an exempt registrant classified as a conscientious objector to report hundreds of miles away at a camp for the purpose of exhausting his administrative remedies and which then permits him to be prosecuted in another district and state far removed from his home and his local board is unreasonable, arbitrary, and deprives the accused of his rights and liberty contrary to the due process clause of the Fifth Amendment. It is highly unjust and inconvenient to make a dragnet for penalties out of a statute of this sort. However, the construction has actually done just that. *United States* v. *Shackford*, 5 Mason 445, 450; *Harrison* v. *Vose*, 50 U. S. 372, 378. "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or absurd consequences. It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character. The reason of the law in such cases should prevail over its letter. Literal interpretation of the statutes at the expense of the reason of the law and producing absurd consequences or flagrant injustice has frequently been condemned" (*United States* v. *Kirby*, 7 Wall. 482, 486-487). A provision of the law "should not be construed as demanding the performance of a task, if ultimately found to be inherently impossible, as a condition of relief to which the claimant would otherwise be entitled." *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 351-352.

Conclusion

The judgments of the courts below should be reversed and the trial court ordered to dismiss the indictment or, in the alternative, a new trial should be ordered.

Respectfully,

TAZE HAMRICK GIBSON,
By HAYDEN C. COVINGTON,
His Counsel.

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